104

No. (1)

Supreme Court, U.S.
FILED
08-154 AUG 4 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CHRISTOPHER TUSKUSKY,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS TRAINING ACADEMY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Morris E. Fischer
Counsel of Record
LAW OFFICE OF MORRIS FISCHER
Air Rights Center
4550 Montgomery Avenue, Suite 601N
Bethesda, Maryland 20814
(301) 469-3498

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

Whether a state agency's failure to follow chain of custody procedures prescribed by law violated Tuskusky's due process rights when after a potentially erroneous positive drug test, the second, "split" sample was unavailable, and Tuskusky was subsequently placed on the Central Drug Registry, removed from his law enforcement job, and permanently barred from similar positions in the future?

Whether a state agency's violation of state laws which provide for the time limits to accept, reject, or modify an administrative judge's decision violated Tuskusky's procedural due process rights?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Chris Tuskusky certifies that he is not a corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CONTENTS TO APPENDIX v

TABLE OF AUTHORITIES viii

DECISIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

I. The Agency's Not Following Chain of Custody Procedures Violated Tuskusky's Due Process Rights 7

II. The Commission's Untimely Rejection and Remand of the Administrative Judge's Decision Was a Violation of Tuskusky's Procedural Due Process Rights 13

CONCLUSION.....13

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Appendix Page

Order of
The Supreme Court of New Jersey
Re: Denying Petition for Certification
entered May 6, 2008 ..... 1a

Unpublished Opinion of
The Superior Court of New Jersey
Appellate Division
entered January 15, 2008 ..... 3a

Initial Decision of
The State of New Jersey
Office of Administrative Law
entered July 20, 2006 ..... 11a

Initial Decision of
The State of New Jersey
Office of Administrative Law
entered September 22, 2003 ..... 33a

Letter to
Michael Pushko from
Jack Venturi
Re: Christopher Tuskausky v.
Department of Corrections
OAL Docket No.: PTC 08746-02S
dated May 7, 2003 ..... 46a

Letter to
NJ Department of Corrections
Training Academy from
Jack Venuri
Re: Christopher Tuskusky
Date of Occurance: 6/27/02
Correctional Staff Training Academy
dated January 22, 2003 ..... 49a

Letter to
Police Training Commission from
Jack Venturi
Re: Christopher Tuskusky
Date of Occurance: 6/27/02
Correctional Staff Training Academy
dated November 18, 2002 ..... 51a

Letter to
Mr. Dermot P. O'Grady from
Jack Venturi
Re: Appeal of Christopher Tuskusky's
Dismissal From The Correctional Staff
Training Program
dated September 25, 2002 ..... 53a

Letter to
NJ Department of Corrections
Training Academy from
Jack Venturi
Re: Christopher Tuskusky
Date of Occurance: 6/27/02
Correctional Staff Training Academy
dated August 23, 2002 ..... 55a

Letter and Fax to
Margaret Hall from
Jack Venturi
Re: Christopher Tuskusky
Date of Occurance: 6/27/02
Correctional Staff Training Academy
dated August 19, 2002 ..... 57a

Letter and Fax to
Police Training Commission from
Jack Venturi
Re: Christopher Tuskusky
Date of Occurance: 6/27/02
Correctional Staff Training Academy
dated July 23, 2002 ..... 59a

Urine Specimen Form for
The New Jersey Department of Corrections
Training Academy
dated June 12, 2002 ..... 61a

Excerpts from Attorney General's
Law Enforcement Drug Testing Policy
dated June, 2001 ..... 63a

Excerpts of Transcript from
The New Jersey Office of Administrative
Law Remand Hearing
undated 76a

TABLE OF AUTHORITIES

Page(s)

CASES

Mathews v. Eldridge,
424 U.S. 319 (1976) 7, 8, 11, 12

National Treasury Employees Union
v. Von Raab,
816 F.2d 170 (5th Cir. 1987), aff'd in part
and vacated in part on other grounds,
remanded,
489 U.S. 656 (1989) 10, 11

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 2,7

U.S. CONST. amend. XIV 2, 7

STATUTES

28 U.S.C. § 1257(a) 2, 12

N.J.S.A. 52:14B-10 ..... 6, 13

DECISIONS BELOW

The initial decision of the New Jersey Office of Administrative Law ("OAL") recommending the dismissal of Tuskusky be reversed was handed down on September 22, 2003, OAL Docket No. PTC 8746-02. By a Remand Order on February 11, 2004, the Police Training Commission ("Commission") reversed the initial decision of the New Jersey OAL and remanded the matter back to the OAL as OAL Docket No. PTC 858-04. OAL proceedings were stayed while Tuskusky appealed, first to the Superior Court of New Jersey Appellate Division, and then to New Jersey Supreme Court via a Petition for Certification based on the untimeliness of the Commission's remand, neither of which were successful. The decision on remand of the New Jersey OAL recommending the dismissal of Tuskusky be upheld was handed down July 20, 2006. The Police Training Commission adopted the findings of this remanded decision on August 24, 2006. The Superior Court of New Jersey Appellate Division's upholding of the Commission's decision was handed down on January 15, 2008, and the Supreme Court of New Jersey filed the denial of Tuskusky's Petition for Certification on May 6, 2008.

JURISDICTION

The Supreme Court of New Jersey denied Tuskusky's Petition for Certification May 2, 2008, and filed same on May 6, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a), which allows for review of a final judgment by the highest court of a State.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the Fifth Amendment is as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The text of section one (1) of the Fourteenth Amendment states:

> "All persons born or naturalized in the United States and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Christopher Tuskusky ("Tuskusky"), was dismissed from the New Jersey Correctional Staff Training Academy ("Academy") on June 27, 2002, when his original urine sample taken ten (10) days earlier tested positive for cocaine.[1] Decision of the Superior Court of New Jersey, Appellate Division. App. 3a. At the time of providing a sample, trainees were given the option to provide a second, "split," sample, which could be tested should there have been a dispute over the testing of the original. See Attorney General's Law Enforcement Drug Testing Policy, IV(B)(6). App. 72a. The split sample is taken simultaneously with the original sample, but is stored separately. Id. Tuskusky provided a split sample pursuant to these procedures. Should anything have happened to the "split" sample, a

[1] Tuskusky's own physician conducted a drug test of him on July 15, 2002, which came back negative.

trainee will have had no way of disputing the results of the original sample.[2]

On July 23, 2002, Tuskusky notified the Commission that he would be appealing the removal, at which time Tuskusky himself sought access to both the original and the second, "split," sample. Id. Tuskusky's attorney sought access to the original or split sample, or both, at least seven (7) additional times, once in July 2002, twice in August 2002, once in September 2002, once in November 2002, once in January 2003, and once in May 2003, but access was never given. See Initial Decision of OAL at 2. App. 33a; Decision of the Superior Court of New Jersey, Appellate Division. App. 3a. The July and August requests were directed to the Commission, which waited until the August letter to notify Tuskusky the correct agency to contact was the Academy. See Decision of the Superior Court of New Jersey, Appellate Division. App. 3a. The Commission never offered any reason as to why, as the parent agency of the Academy, their receipt of the requests was not sufficient. Additionally, the OAL administrative judge issued two (2) orders to the Academy to produce the split sample in May, 2003 to which the

[2] Throughout the litigation on this matter, Tuskusky requested all chain of custody documents for the original and split sample; for over ten (10) months, however, all discovery requests were ignored.

Academy was non-responsive. See Initial Decision of OAL at 2.[3] App. 33a. Despite Tuskusky's own requests and these orders, it was not until September, 2003 that Tuskusky was notified his split sample had been destroyed. See Decision of the Superior Court of New Jersey, Appellate Division. App. 3a.

There were, moreover, problems with Tuskusky's original sample. At some point in the litigation, the Commission finally produced the continuity of evidence for Tuskusky's original sample. See Continuity of Evidence: Urine Specimen. App. 61a. The document makes it clear that the chain of custody was totally lacking for Tuskusky's original sample, as there was no record of when, or by whom, the sample was removed from evidence storage, transported to the State Toxicology Laboratory, or received at the State Toxicology Laboratory. Id. This was not the only problem with Tuskusky's original sample. Sergeant Richard Nappa ("Nappa") testified that chain of custody procedures were not followed for Tuskusky's sample.

---

[3] The initial order on May 5, 2003, required the Academy to provide all discoverable material to the Tuskusky. Somehow not understanding the nature of a court-order for production of "all discoverable material," the Academy responded that an order would be required for the split sample. On May 21, 2003, the administrative judge issued an additional order confirming the contents of the May 5, 2003 order and requiring the Academy to confirm the location of the split sample. The Academy, for a second time, flagrantly disregarded the terms of a court-order, responding to the May 21, 2003 order requiring production of the *urine sample* with the nonsensical statement that all discoverable *documents* had been provided. See Initial Decision of OAL at 2-3. App. 33a.

See Testimony of Sgt. Nappa at 58. App. 77a (asserting his name was on chain of custody documents, but he did not properly witness the voiding). Dr. Havier, an employee of the laboratory, acknowledged that they could not account for where the sample was at all times. Testimony of Dr. Havier at 120. App. 87a. In addition to the problems Nappa mentioned, Patricia Watson ("Watson"), a new instructor who was accompanied by Robert Torro ("Torro") because of her inexperience, failed to complete the proper paperwork regarding the chain of custody for the samples for *everyone* in Tuskusky's trainee class, and was eventually disciplined for that mistake. Id. at 64. App. 85a.

On September 25, 2003, the OAL handed down its initial decision reversing the dismissal of Tuskusky on the grounds the Commission and/or Academy failed to prove a proper chain of custody. Initial Decision of OAL at 6-7. App. 33a. The OAL's reasoning in this initial decision was sound. The decision and order of the decision provided that should the Police Training Commission not adopt, modify, or reject the decision within forty-five days, it shall become final under N.J.S.A. 52:14B-10. Id. The Commission obtained one (1) extension for its response, making it due a total of ninety (90) days from September 25, 200, or December 24, 2003. The Commission's remand order, however, was not issued until February 11, 2004. Remand Decision of OAL at 2. App. 11a.

REASONS FOR GRANTING THE PETITION

I. The Agency's Not Following Chain of Custody Procedures Violated Tuskusky's Due Process Rights

The agency failed to properly follow prescribed chain of custody procedures for Tuskusky's sample. The agency's failure to follow these procedures led to Tuskusky's name placed in the Central Drug Registry and Tuskusky being discharged from his employment with the state and barred from similar positions in the future. For purposes of this Petition, Tuskusky asserts only the denial of a liberty interest without due process of law – specifically, that the placement of his name of the Central Drug Registry, and his bar from any future employment with law enforcement in New Jersey is unconstitutional under the Fifth and Fourteenth Amendments.

In Mathews v. Eldridge, this Court noted "procedural due process imposes constraints on governmental decisions which deprive individuals of *'liberty' or 'property'* interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." 424 U.S. 319, 332 (1976) (emphasis added). The hearing provided to an aggrieved party prior to denial of their liberty or property interest must be given in a "meaningful manner." Id. The test for whether a given hearing is constitutionally sufficient under the Fifth and Fourteenth Amendments – i.e. whether it was given in a "meaningful manner" – analyzes:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335.

Turning to application of the Mathews factors, the private interest at stake for Tuskusky is great. Under the Attorney General Drug Testing Guidelines, a positive drug test is grounds for dismissal, and a future bar from all law enforcement employment in New Jersey. Attorney General's Law Enforcement Drug Testing Policy VII(B). App. 74a. The bar to future employment is accomplished by placing Tuskusky's name in the Central Drug Registry. Id.

Second, the risk of error in the given procedures is acceptable, but only *presuming the prescribed procedures were followed*. As the OAL found in its initial decision in 2003, however, the prescribed procedures were not followed. (noting "[i]t is clear that respondent herein failed to comply without deviation with the drug screening procedures outlined in the Commission Rules, and I so **FIND**." Initial Decision of OAL at 6 (emphasis in original) App. 33a. Even on remand to the OAL, when the same administrative judge reached the

exact opposite conclusion regarding the chain of custody, it was acknowledged that an employee handling the samples failed to follow proper procedures. See Remand Decision of OAL. at 9. App. 11a. Moreover, the great probative value of additional procedure is acknowledged by the state; a second, "split," sample is taken at the same time of the initial sample in case there is a disputed result. See id. at 2. App. 11a.

In this case, however, the "split" sample was destroyed by the Academy. Decision of the Superior Court of New Jersey, Appellate Division. App. 3a. Decisions below relied on the reasoning that because Tuskusky's counsel did not notify the proper agency, the Academy, until seven (7) days beyond the time when it could have destroyed the sample, there was nothing improper done. Id. (noting Tuskusky's counsel notified the Academy on August 23, 2002, which was sixty-seven days after collection of the sample). This reasoning, however, ignores the fact that Tuskusky was not notified about the destruction of his sample until September, 2003, over a year after a request was put to the correct agency. Id. During this year, four (4) more requests from Tuskusky's attorney and two court-orders (2) for production of the split sample went unheeded and unanswered. Id.[4]

---

[4] The Academy has never given any reason whatsoever for the delay in the face of multiple requests and court-orders. The Academy claimed that it had sent a reply to Tuskusky's initial request in July, 2002, but never produced any certified receipt to back up its bare assertions.

Thus, the risk – indeed, the fact – of error here is great because of the Academy's horrendous handling of Tuskusky's split sample, while the probative value is enormous – the split sample had the possibility of exonerating Tuskusky. The risk to Tuskusky was thus double sided – not only was his split sample erroneously destroyed, but the chain of custody for his original sample was lacking entirely. See Continuity of Evidence: Urine Specimen. App. 61a.

There is another issue implicated by the risk of errors in the given procedures. The New Jersey Appellate Court decision stated, "where in this instance, the split sample is "merely potentially exculpatory," it is imperative that bad faith be established on the part of the agency." See Decision of the Superior Court of New Jersey, Appellate Division. App. 3a. This New Jersey common law, as cited in this case, puts the burden squarely on persons in Tuskusky's position – those implicated for using illegal drugs – to prove their innocence. See also, Decision of the Superior Court of New Jersey, Appellate Division (putting the burden on Tuskusky to prove bad faith, materiality of the sample, and prejudice resulting from destruction). App. 3a. At the federal law, drug testing policies for federal employees have been upheld only where, should there be an overly high number of false positives, follow up testing is allowed and accurate assuming proper handling, storage and measurement. See National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987) (aff'd in part and vacated in part on other grounds, remanded, 489 U.S. 656 (1989)).

Under the factors enumerated in Mathews, putting the burden on Tuskusky to prove prejudice and bad faith resulting from the destruction of the split sample is a denial of due process because it involves far too much risk to his rights. 424 U.S. at 335. As the Court first noted in Mathews, this is a case where the "truthfinding process as applied to the generality of cases" is deficient because of the invalid burden shifting scheme in New Jersey. 424 U.S. at 344. And unlike Von Raab, Tuskusky was not allowed sufficient follow up testing; indeed – it was totally lacking. 816 F.2d at 181 (stating the second, follow up test is "almost always accurate, assuming proper storage, handling, and measurement techniques"). Neither was Tuskusky given proper chain of custody procedures, which the Court in Von Raab found so important: "Customs also employs elaborate chain-of-custody procedures to minimize the possibility of falsely positive readings." Id. As asserted, supra, chain of custody procedures for Tuskusky's original sample were wholly deficient. See Continuity of Evidence: Urine Specimen. App. 61a. The New Jersey Superior Court, Appellate Division, placed the burden on Tuskusky to prove his innocence to a bad faith standard when such evidence is unavailable to him. As noted supra, the agency had ignored repeated discovery requests for ten (10) months, making the Appellate Division's insistence on evidence proving bad faith – when such evidence had been withheld from Tuskusky – a blatant denial of his due process rights.

Counsel for Tuskusky understands it is not within the power of this Court to pass on a New Jersey state court's interpretation of its own laws, and that the decision of New Jersey Superior Court, Appellate Division in this case is effectively final as to New Jersey law where the Petition for Certification was denied. This case presents the situation however, where New Jersey case law has placed a burden of proof upon Petitioner Tuskusky which is unconstitutional under the federal constitution, and this Court may pass on that question. See 28 U.S.C. § 1257(a). In any case, the New Jersey Superior Court Appellate Division wholly failed to consider the prejudice factor, instead discussing whether there was a "showing of manifest prejudice or harm," a different standard. See Decision of the Superior Court of New Jersey, Appellate Division. App. 3a. Thus, besides where the Commission chose to ignore its own procedures for drug testing Tuskusky's sample, this case has a second example of the state of New Jersey and its subdivisions failing to apply its own standards correctly, thereby violating Tuskusky's federal due process rights. See Mathews, 424 U.S. at 344.

Finally, the burdens on the government here are slight. There are already procedures in place which could have exonerated Tuskusky. See Initial Decision of OAL at 3-5. App. 33a. However, these procedures were simply not followed. Id. at 6; Continuity of Evidence: Urine Sample (showing lack of signatures, which would illustrate receipt of the original urine sample, for the bulk of the chain of custody) App.61a; Remand Decision of OAL at 9

(noting Patricia Watson failed to follow prescribed procedures for chain of custody). App. 11a.

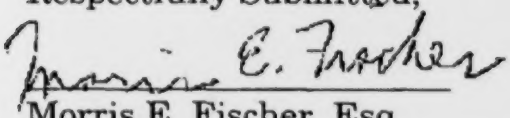
II. The Commission's Untimely Rejection and Remand of the Administrative Judge's Decision Was a Violation of Tuskusky's Procedural Due Process Rights

On September 25, 2003, the OAL handed down its initial decision reversing the dismissal of Tuskusky. Initial Decision of OAL at 7. App. 33a The decision and order of the decision provided that should the Police Training Commission not adopt, modify, or reject the decision within forty-five days, it shall become final under N.J.S.A. 52:14B-10. Id. The Commission obtained one (1) extension for its response, making it due a total of ninety (90) days from September 25, 200, or December 24, 2003. The Commission's remand order, however, was not issued until February 11, 2004, and was therefore untimely. Remand Decision of OAL at 2. App. 11a. The initial decision of the OAL became the final decision as to Petitioner's dismissal on December 24, 2003, and that decision reversed his dismissal.

CONCLUSION

For the reasons stated above, the decision dismissing Tuskusky should be reversed in its entirety and his name should be removed from the Central Drug Registry.

Respectfully Submitted,



Morris E. Fischer, Esq.
Air Rights Center
4550 Montgomery Avenue
Suite 601 N
Bethesda, MD 20814
(301) 469-3498 phone
(301) 469-3499 fax
Attorney for Petitioner

APPENDIX

RECEIVED MAY 09 2008

SUPREME COURT OF NEW JERSEY
C-883 September Term 2007
62,270

CHRISTOPHER TUSKUSKY

Plaintiff-Petitioner,

v. ON PETITION FOR CERTIFICATION

DEPARTMENT OF CORRECTIONS,

Defendant-Respondent.

To the Appellate Division, Superior Court:

A Petition for certification of the judgment in A-910-06 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 2nd day of May, 2008.

/s/
CLERK OF THE SUPREME COURT

The foregoing is a true copy
of the original on file in my office.

/s/_____
CLERK OF THE SUPREME
COURT OF NEW JERSEY

Original Wordprocessor Version
(NOTE: The status of this decision is **unpublished**.)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0910-06T20910-06T2

CHRISTOPHER TUSKUSKY,

Appellant,

v.

DEPARTMENT OF CORRECTIONS TRAINING ACADEMY,

Respondent.

Submitted October 29, 2007 —
Decided January 15, 2008

Before Judges Parrillo and Alvarez.

On appeal from a Final Decision of the Police Training Commission, OAL Docket No. PTC 00858-04.

Jack Venturi & Associates, attorneys for appellant (Jef Henninger, on the brief).

Anne Milgram, Attorney General, attorney for respondent, New Jersey Department of Corrections (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Betty M. Ng, Deputy Attorney General, on the brief).

Anne Milgram, Attorney General, attorney for respondent, Police Training Commission (Dermot P. O'Grady, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner, Christopher Tuskusky, appeals from an August 24, 2006 final decision of the Police Training Commission (Commission) dismissing him from the basic course offered at the Department of Corrections Training Academy (Academy). We affirm.

After a somewhat tortured procedural history, the matter was transmitted to the Office of Administrative Law for hearing on a remand order. The Administrative Law Judge (ALJ) on July 20, 2006, issued an initial decision affirming the dismissal, as he found that the chain of custody as to the petitioner's test sample, which was found to be positive for cocaine, was reliable. He also found that the Academy's destruction of a second sample fell within agency guidelines, and was therefore not in violation of due process. On August 24, 2006, the

Commission by final decision adopted the ALJ's findings and conclusions of law.

No person is appointed to the position of corrections officer, the job sought by petitioner, until they successfully complete a training course at an approved school. N.J.S.A. 52:17B-68.1(a). The Academy is the approved school for corrections officer trainees. Pursuant to N.J.A.C. 13:1-7.2(a)(19), the Academy is authorized to screen for drug use all participants in the basic training program. The manner in which such testing will be conducted is also codified, N.J.A.C. 13:1-7.2(a)(19)(i). The director of the Academy must dismiss any trainee who tests positive for illegal drugs, as did the petitioner, N.J.A.C. 13:1-7.2(a)(19)(ii).

The facts are essentially undisputed. Petitioner was dismissed from the Academy on June 27, 2002, as a result of the positive urine sample which was collected on June 17, 2002. When the sample was taken, a second urine specimen, or "split sample," was also collected. Like all the trainees, petitioner was given a label that he completed and affixed to the specimen container. As instructed, petitioner placed his social security number on the label in addition to other identifying information. He voided into the bottle which he had labeled and returned the sealed container, along with the appropriate paperwork, to a designated officer. The bottle is then checked for leakage, and stored in a secure location. All samples are collected from this secure location and delivered to the State lab. On that particular day, the samples were delivered but the officers assigned to the task failed to obtain a

receipt from the lab. Hence, petitioner's chain of custody argument, as there is no documentation in the Academy's possession to verify delivery of the sample to the lab.

When the samples are received by the State lab, they are examined to ensure the container is properly sealed, and has not been tampered with or been damaged. Next, the individual's social security number, the date and time of submission, and the name of the person who accepted the specimen for testing, are entered into a computer database and the sample is assigned a lab "tox" number. A special tool is used by the lab technician to cut the top off the bottle so the contents can be tested. The lab uses a two-step process in its analysis. First, an initial screening test is conducted. Should cocaine metabolites be found, as were in this case, a report is generated. The machine that performs the initial screening is automated and checked daily for accuracy. Second, the sample is submitted to a gas chromatography/mass spectrophotometry (GC/MS) test, a definitive test for cocaine. For this test, additional fluid is removed from the collection bottle. A control sample is then taken to confirm the original screening. The sample result is reviewed by a medical review officer not affiliated with the State lab. At the administrative hearing, records were admitted into evidence verifying these standard procedures were employed hi testing petitioner's sample.

Petitioner was dismissed on June 27, 2002, ten days after his sample was collected. On July 23, 2002, his attorney notified the Commission that the

dismissal was being appealed and he requested discovery. A second letter, which included a request that the split sample be made available for testing by an independent laboratory, was sent to the Commission on August 19, 2002. On August 23, 2002, upon being informed that the correct agency from which to obtain the split sample was the Academy and not the Commission, the attorney requested the split sample and discovery from the Academy. This request came approximately sixty-seven days after collection of the sample. By letter dated September 29, 2003, petitioner was notified that in accord with its sixty-day retention policy, the Academy had destroyed the split sample.

Petitioner adamantly denies ever consuming drugs and contends that his due process rights were violated by the destruction of the split sample. He contends that testing by an independent laboratory would have found it to be negative for cocaine. In reliance on George v. City of Newark, 384 N.J. Super. 232 (App. Div. 2006), the ALJ, however, concluded that the destruction of the split sample did not violate plaintiffs due process rights.

As set forth in George, where there has been "'destruction of physical evidence[]' our courts focus on three factors to determine whether a due process violation has occurred." Id. at 243 (quoting State v. Dreher, 302 NJ. Super. 408, 483 (App. Div.), certif. denied, 152 NJ. 10 (1997), cert. denied, 524 U.S. 943, 118 S. Ct. 2353, 141 L. Ed. 2d 723 (1998)). The factors are: bad faith on the part of the government, the materiality of the evidence to the defense, and

the prejudice resulting from its destruction. Ibid. (citing Dreher, supra, 302 NJ. Super. at 483).

Where, as in this instance, the split sample is "merely potentially exculpatory," it is imperative that bad faith be established on the part of the agency. Ibid. (citing State v. Ruffin, 371 NJ. Super. 371, 392 (App. Div. 2004)). In an ideal world, better communication would have occurred intra-agency and the sample would have been preserved. In reality, however, the wrong agency was asked for the split sample within the sixty-day retention period. It was only after that time frame lapsed that petitioner notified the correct agency of his request. This sequence of events is not equivalent to bad faith.

The split sample was obviously material to an appeal of the dismissal. But when bad faith is absent, relief should be granted only if "'there is a showing of manifest prejudice or harm.'" Ibid. (quoting Dreher, supra, 302 NJ. Super. at 489).

Here, petitioner falls short. There was substantial testimony in the record as to the reliability of both tests to which the sample was subjected. There is no evidence of any false-positive rate associated with the GC/MS test. See id. at 244 (explaining that without evidence of false-positive results with GC/MS testing it is difficult to show a defendant was prejudiced without a split sample). Since the test outcome is trustworthy, loss of the split sample does not prejudice the petitioner.

Despite its destruction, petitioner was able to pursue an appeal of his dismissal and a full hearing

was conducted thereon. Therefore, the ALJ correctly concluded, in accordance with George, supra, 384 N.J. at 243-45, that the unavailability of the split sample did not constitute a denial of due process of law.

Petitioner also challenges the admissibility of the test results based on the allegedly flawed chain of custody. The determination of whether the chain of custody of a urine sample has been sufficiently established to justify admission of test results is one left to the discretion of the trier of fact. In re Lalama, 343 N.J. Super. 560, 565 (App. Div. 2001). Test results "should be admitted if there is a 'reasonable probability that the evidence has not been changed in important respects.'" Id. at 565-66 (quoting State v. Branson, 132 N.J. 377, 393-94 (1993)). "[I]t is not necessary for the party introducing such evidence 'to negate every possibility of substitution.'" Id. at 566 (quoting State v. Brown, 99 N.J. Super. 22, 28 (App. Div.), certif. denied, 51 N.J. 468 (1968)). In administrative proceedings where more relaxed rules of admissibility of evidence apply, the standard is even more generous. Ibid.

The ALJ determined, and we agree, that the Academy established an uninterrupted chain of custody of petitioner's urine sample despite the failure of its personnel to obtain a receipt when delivery was made to the lab. The paperwork completed by petitioner identifying his sample was assigned a number at the lab's door. The documentation bearing the lab number accompanied the sample at every phase of testing. "An appellate court's review of an administrative agency's findings

of fact is limited to a determination of whether those findings are supported by 'sufficient credible evidence in the record.'" Id. at 564-65 (quoting In re Taylor, 158 N.J. 644, 657 (1999)). The decision by the Commission to adopt the ALJ's findings is not "arbitrary, capricious, unreasonable, or violative of expressed or implicit legislative policies." George, supra, 384 N.J. Super. at 238 (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/
CLERK OF THE APPELLATE DIVISION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PTC 858-04
(ON REMAND OAL DKT. NO. PTC 8746-02)
AGENCY DKT. NO. CJ02-9492-HPT

CHRISTOPHER TUSKUSKY,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS TRAINING ACADEMY,

Respondent.

Jeffrey D. Henninger, Esq., for petitioner (Jack Venturi and Associates, attorneys)

Betty N. Ng, Deputy Attorney General, for respondent (Zulima Farber, Attorney General of New Jersey)

Record Closed: June 5, 2006
Decided: July 20, 2006

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals his dismissal by the Department of Corrections Training Academy from a Basic Course for Correction Officers because of a positive drug test for cocaine. Petitioner requested a hearing, and the matter was originally transmitted to the Office of Administrative Law (OAL) on December 30, 2002, for hearing as a contested case, and was assigned OAL Docket No. PTC 8746-02. On September 25, 2003, I issued an initial decision in that matter granting petitioner's motion to reverse petitioner's dismissal from the Training Academy.

By a Remand Order entered on February 11, 2004, the Police Training Commission reversed the initial decision and remanded the matter for further proceedings. The matter was transmitted to the OAL on remand on March 3, 2004, and was assigned OAL Docket No. PTC 858-04. I then scheduled the matter for hearing to commence on July 16, 2004. The hearing was adjourned at the request of petitioner because of his appeal of the Remand Order to the Appellate Division. The matter was rescheduled for hearing to commence on April 13, 2005, and again on December 1, 2005, and these hearing dates were again adjourned because of the pending appeal and a subsequent Petition for Certification to the Supreme Court. The matter was rescheduled for hearing on May 15, 2006, and on that date, because the appeals had been concluded, the hearing was held. However, the record remained open to allow written submissions. The record was closed on June 5, 2006.

FACTUAL DISCUSSION

The following facts are undisputed. Petitioner was dismissed from the Correctional Staff Training Academy on June 27, 2002, for a urine sample in which he tested positive for cocaine (R-8). It is undisputed that attorney for petitioner sought to obtain access to an existing second urine specimen or "split sample" in July and August 2002, prior to the transmittal of this matter to the OAL. Additional discovery requests were made in November 2002, and January 2003. On April 26, 2003, some initial discovery was provided, but the location of the second urine sample was not disclosed to attorney for petitioner.

An order was entered in the first matter on May 5, 2003, requiring that respondent provide discovery of all discoverable material. In response to this, the attorney for respondent indicated that an order was required to obtain petitioner's urine sample. An additional order was entered on May 21, 2003, confirming the contents of the order of May 5, 2003, and requiring that respondent confirm the location of the second urine sample of petitioner. The split sample was never provided to petitioner's attorney for retesting.

At the hearing in this matter on remand held on May 15, 2006, petitioner testified on his own behalf. He stated that he applied for the position of correction officer because he was interested in the field and he saw an opportunity for employment in a position that offered job security. Upon entering the Training Academy, he was tested for drugs on the

first day. The entire class proceeded to the bathroom and they were given a specimen jar. He provided a split sample and the report came back two weeks later indicating that his sample was positive for cocaine. He was dismissed from the Academy on this basis. He appealed because he does not use drugs and has never used drugs. He explained that he was an EMT and has seen firsthand what drugs do. He stated that he would not take cocaine into his body. He has been to dinner and to bars and at the time was working two jobs. He had an invalid mother at the time, but she has since died in September 2005. His mother was the sole guardian of an autistic brother. He was working in real estate at the time. He was tested on June 17, 2002, and was dismissed on June 27, 2002. He requested through his attorney that the split sample be tested. He was subsequently advised that the split sample was destroyed about three months ago. He does not know why this occurred. He does not do drugs and he will not be dismissed for something he did not do.

On cross-examination, petitioner testified that he recognizes Officer Britt and that the drug testing procedure was explained. Prior to voiding, the recruit must fill out a list of medications (R-3). He identified the Continuity of Evidence Urine Specimen and identified his social security number thereon (R-4). He acknowledged that he received the Dismissal Notice of June 27, 2002 (R-5).

On redirect, petitioner testified that his attorney was seeking to have the split sample tested and he directed his attorney to do so, but was

advised that it had been destroyed. He identified his attorney's letter of July 24, 2002, and indicated that his appeal had been received timely. He also identified his attorney's letter of August 19, 2002, requesting the split sample for testing (P-3). He identified the Police Training Commission letter of August 23, 2002, in which his attorney was told that he had to request the split sample from the Department of Corrections. He then identified the letter from the Department of Corrections advising that the split sample had been destroyed. He reasserted that he wanted to have the split sample tested to show that he was free of drugs.

On recross-examination, petitioner indicated that he was aware that the PTC approves correction officer trainees. He was not aware that the PTC does not retain urine samples.

The first witness to testify for the respondent was Richard Nappa, a Correction Sergeant employed by the Department of Corrections. He is in his nineteenth year of employment and is presently assigned to the Albert C. Wagner Youth Correction Facility. During 2002 and 2003, he was assigned to the Department of Correction Training Academy at Sea Girt. He was a sergeant at that time and was the class coordinator assigned to coordinate training and curriculum.

Sergeant Nappa testified that he is familiar with Department of Correction policies concerning drug testing, and the Academy at Sea Girt complies with these policies. Trainees were notified of these policies by him as the class coordinator. They are

given an orientation session during which he reads the entire policy and procedure to the trainees and explains laboratory procedures. He also goes into the forms which must be filled out. These include the green card, front and back (R-1) and the form regarding their medical history and history of taking medications (R-3). He tells the trainees to go back 30 days and list any medications they have taken. The label is given to the trainees (R-4) and each trainee is given a urinalysis bottle (R-6). They are instructed to inspect and place their ID number on the label. They are then required to void into the bottle. Samples are generated and collected at the same time. They void a urine sample into the bottle. There have been no break-ins into building 14. The next day the area lieutenant would assign someone to take the urine samples to the state laboratory. The laboratory accepts delivery and issues a receipt. The instructors who delivered the samples in this case were Patricia Watson and Robert A. Toro. The results are then sent from the laboratory to the Captain of the Academy. He identified the laboratory results for petitioner (R-8). When this was received, the Captain of the Academy as well as the witness, met with the trainee, advised the trainee of the policies and procedures for appeals and advised of the laboratory results. The sanction for a positive test result is immediate removal from the Academy.

On cross-examination, Sergeant Nappa testified that the official monitor taking the samples was Dan Braun, a Senior Correctional Officer. He identified the Attorney General Guidelines. Officer Braun has since transferred to the Division of

Parole, and is now on military leave and is not available to testify in this matter. He admitted that Patricia Watson failed to follow proper paperwork in obtaining a receipt for the samples. Sergeant Watson has since retired.

The next witness was Vance Britt, Principal Training Technician. He has been with the Department of Corrections for 15 years and was with the Academy for ten years. He is responsible for training and academics. He was a Senior Correction Officer prior to his present position as a Principal Training Technician. He is familiar with the drug policy and was one of the monitors. His responsibility was to make sure the specimen complied with all required procedures. He identified the specimen bottle and he indicated that the trainees had all of the documents which he would eventually collect. After the specimen was voided into the urine bottle he would check it for leakage. He signed a receipt for it and stored it in building 14, in a padlocked location; the lieutenant and supervisor being the only ones with access. There was no break-in at the time.

Dr. Robert Havier testified that he is employed by the State of New Jersey at the State Toxicology Laboratory. He is a Forensic Toxicologist and has been since 1996 and has been so employed for 27 years. He testified to his educational background and has a Bachelor of Science degree in Chemistry and a Ph.D. degree in Biological Chemistry. He has published five or ten articles and is a member of a number of societies and professional organizations dealing with forensic

toxicology. He has testified as an expert witness in approximately 30 cases previous to this matter. He was accepted as an expert witness in forensic toxicology. The Laboratory is also certified by the College of Medical Pathology.

Dr. Havier indicated that drug testing consists of eight categories of drugs and he has supervised that section for ten years. He follows the Attorney General's guidelines and there are 19,000 tests per year. He is familiar with the sample collection bottle (R-6) and the Laboratory uses them to collect urine samples. He indicated that the urine bottle requires a special tool for cutting off the top. When the bottle is received at the laboratory, technicians are trained to look for tampering, and samples have been rejected by the Laboratory if they are not sealed. The tox case number is assigned by the Laboratory upon receipt of the sample bottles. In this case, Renee Biziak, a technician employed at the Laboratory, received the samples for the lab and she was trained to recognize tampering. The samples are tested as soon as possible, but in the meantime they are stored in a secured, sealed area of the Laboratory. Law enforcement officers are not allowed access to the stored specimen. There is an initial screening test in which, in effect, the Laboratory is looking for the metabolite for cocaine, and which generates a report (R-10). All of the testing is automated and the testing instrument is checked daily for accuracy (R-12). In this case Dr. Havier testified to his opinion, with a reasonable degree and scientific certainty, that the testing machine was working properly.

Even though there was a positive result for cocaine, this must then be confirmed by another test called a gas chromatography/mass spectrometry (GC/MS) test, which is a definitive test for cocaine. Another sample from the urine is used and all instruments are checked daily for functionality. There was a control sample which was found to be within experimental error and this confirmed the original screening of positive for cocaine. This was then reviewed by a medical review officer who is not affiliated with the Laboratory.

On cross-examination, Dr. Havier admitted he did not do the testing personally. He testified that the first contact of petitioner's sample with the laboratory was when it was accepted by Renee Biziak on June 18, 2002, at 3:02 p.m. Ms. Biziak would have brought the sample into the testing area based on the fact that the sample was assigned a tox number. It was at this point that the laboratory started its own internal chain of custody records (R-7). The Laboratory only relies upon and uses the GC/MS test if the screening test result is positive. Samples are kept in the secure testing area in the refrigerator. When labels are placed on the sample the lab technician checks the social security number. If the instruments do not meet the criteria for testing the test results are not used.

LEGAL DISCUSSION AND ANALYSIS

In order to assure that correction officers are fully trained and qualified for the carrying out of their duties and responsibilities, N.J.S.A. 52:17B-68.1a provides that no person shall be given a

permanent appointment as a corrections officer unless such person has successfully completed a training course at an approved school. N.J.S.A. 52:17B-71(a), (c), and (e), vests in the Police Training Commission the power, responsibility and duty to prescribe standards for the approval of schools at which police training courses for corrections officers shall be conducted, to prescribe the curriculum, the minimum courses of study and standards of operation for such schools and to certify corrections officers who have satisfactorily completed training program.

N.J.S.A. 52:17B-1(h) further provides that the Police Training Commission is authorized to make such rules and regulations as may be reasonably necessary or appropriate to accomplish the purposes and objective of the Act. Pursuant to this authority, the Police Training Commission has adopted N.J.A.C. 13:1-7.2(a), which specifies the responsibilities of the entity operating the training Academy, and states in subparagraph 1. that the law enforcement agency, combination of law enforcement agencies, institution of higher learning, or recognized governmental entity certified to operate a school is vested with power, responsibility and duty to comply with all Commission rules, standards and directives governing the operation of the school. Subparagraph 19 states that the training academy has the power

> To conduct drug screening of all trainees so as to provide for the safety and welfare of all trainees, instructors and other school personnel. Drug

testing shall be conducted during all basic courses in which use of force and unarmed defensive tactics training is provided. Trainees may be tested at any time during a basic course.

i. All drug testing conducted at Commission-approved schools during a basic course shall be consistent with and utilize the procedures and methods set forth in the New Jersey Law Enforcement Drug Testing Policy and the New Jersey Drug Testing Manual, incorporated herein by reference, and including any future supplements and amendments, which can be obtained from the Commission at 25 Market Street, PO Box 085, Trenton, New Jersey 08625-0085, or from the Division of Criminal Justice website at www.njdcj.org;

ii. The school director shall dismiss any trainee who produces a positive test result for illegal drug use. Such dismissal shall constitute a dismissal for misconduct; and

iii. The Commission may, as circumstances warrant, notify the central registry maintained by the Division of State Police of a trainee's positive test result for illegal drug use.

Based upon the foregoing it is clearly stated that New Jersey Law Enforcement Drug Testing Policy, commonly referred to as the Attorney General's Drug Testing Policy (P-6), and the New Jersey Drug Testing Manual, are incorporated into the Police Training Commission's regulations by reference.

Under the provisions of the Attorney General's Policy (P-6), Section IV.A. a staff member of the school is responsible for ensuring that all required documentation is fully and accurately completed, that specimens are collected in a manner that provides for individual privacy while ensuring the integrity of the specimen, and for complying with chain of custody procedures.

With regard to the issue of chain of custody, the Police Training Commission reviewed the initial decision of September 25, 2003, and examined certain exhibits as noted in that initial decision. From its review, the Commission determined that exhibit J of P-1 (now R-4) together with exhibits A and B of R-1 (now R-7 and R-8 respectively) lay the foundation for a sufficient chain of custody in this matter. The Commission observed that exhibit J (R-4) states that petitioner's specimen bearing petitioner's social security number was collected by respondent. Exhibit A (now R-7) states that the specimen bearing petitioner's social security number was transported to and received by the State Toxicology Laboratory. Exhibit B (now R-8) states that the specimen bearing petitioner's social security number was analyzed by the Laboratory. The Commission further determined that at that point in

the case, petitioner failed to show that the chain of custody in this matter was insufficient. Thus, based on its review of the matter, the Commission rejected the conclusion in the initial decision that a chain of custody had not been established and that petitioner's motion should be granted. From its review, the Commission concluded that at that point in the case, a sufficient chain of custody had been established, and that both parties should have the opportunity to introduce testimony and other evidence concerning the chain of custody before a ruling rules on its sufficiency. As a result, the Commission remanded petitioner's appeal to the OAL for further proceedings.

At the hearing of this matter on remand, Sergeant Nappa testified that the official monitor taking the samples was Dan Braun, a Senior Correction Officer. The label is given to the trainees to fill out (R-4) and each trainee is given a urinalysis bottle (R-6). They are instructed to inspect the bottle and place their ID number on the label and insert it in the bottle. He advised the trainees to go back 30 days and list any medications they have taken on their medical history card (R-3). The trainees are then required to void into the bottle. Samples are generated and collected at the same time. The next day the lieutenant assigned instructors Patricia Watson and Robert A. Toro to take the urine samples to the State Laboratory which then accepts delivery and issues a receipt (R-7). He admitted that Patricia Watson failed to follow proper paperwork in obtaining a receipt for the samples because of her failure to have the Training Academy Continuity of Evidence form (R-4)

completed. However, the New Jersey State Toxicology Laboratory Specimen Submission Record, which refers to petitioner's specimen by his social security number (R-7), is properly filled out and is sufficient to establish the continuity of evidence.

Vance Britt, Principal Training Technician, a former Senior Correction Officer, who is familiar with the drug policy, was one of the monitors. His responsibility was to make sure the specimen complied with all required procedures. He identified the specimen bottle and he indicated that the trainees had all of the documents which he would eventually collect. After the specimen was voided into the urine bottle he would check it for leakage. He signed a receipt for it and stored it in building 14, in a padlocked location; the lieutenant and supervisor being the only ones with access. Both Sergeant Nappa and former Officer Britt testified that there have been no break-ins into building 14.

With regard to chain of custody of the sample while in the possession of the State Laboratory, Dr. Havier testified that petitioner's sample was accepted at the lab by Renee Biziak on June 18, 2002, at 3:02 p.m. It was examined for proper sealing and tampering and was brought into the testing area and assigned a tox number. When the label with the tox number is placed on the sample the lab technician checks the social security number. It is at this point that the laboratory started its own internal chain of custody records. Samples are kept in the secure testing area in the refrigerated.

Evidence Rule 803(6) provides that certain statements are not excluded by the hearsay rule, whether or not the declarant is available as a witness, including a statement contained in a writing or other record of acts, events, conditions made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

Based upon Evidence Rule 803(6), the foregoing statements contained in the chain of custody documents record acts, events, conditions, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, and were made in the regular course of business and it was the regular practice of that business to make it. Therefore, I **FIND** that these documents are sufficient to show a reasonable probability that the integrity of the sample has been maintained because a relaxed standard of admissibility of evidence applies in administrative proceedings. In re Lalama, 343 N.J. Super. 560, 566 (App. Div. 2001). In the Lalama case, even though the laboratory's courier did not sign and date the transmittal form or leave a receipt, the seal on the sample was unbroken and a witness testified to the delivery of the sample.

As was stated in In re Lalama:

> Such evidence should be admitted if there is a "reasonable probability that the evidence has not been changed in important respects." Thus, it is not necessary for the party introducing such evidence "to negate every possibility of substitution." * * * . [I]t is even clearer in an administrative proceeding that a party seeking to introduce drug test results only needs to show a "reasonable probability" that the integrity of the sample has been maintained, because a relaxed standard of admissibility of evidence applies in administrative proceedings. [Citations omitted.]
>
> [Id at 565-566.]

Based on the foregoing undisputed testimony and the documentary evidence, I **FIND** that respondent has presented adequate evidence of the chain of custody of appellant's urine sample.

The positive test results in this matter were then sent from the State Laboratory to the Captain of the Academy. The laboratory results for petitioner showed positive for cocaine (R-8). Dr. Havier, respondent's expert witness in forensic toxicology, fully explained the testing procedures used by the State Laboratory, and expressed his expert opinion that the GC/MS is a definitive test for cocaine. Based on the undisputed testimony of this

expert, I **FIND** that there is sufficient evidence in the record to support a finding of a positive test for cocaine, and I so **FIND**. The sanction for a positive test result is immediate removal from the Academy.

This brings up the issue of the split sample. Petitioner's undisputed testimony is that his attorney was seeking to have the split sample tested and he directed his attorney to do so, but was advised that it had been destroyed. There is nothing in the record to establish when it was destroyed. Petitioner identified his attorney's letter of July 23, 2002 (P-1) addressed to the Police Training Commission, and indicated that his appeal had been received timely. He also identified his attorney's letter of August 19, 2002 (P-3), requesting the split sample for testing. He identified the Police Training Commission letter of August 23, 2002 (P-4), in which his attorney was told that he had to request the split sample from the Department of Corrections. He identified his attorney's letter dated August 23, 2002, to the Department of Corrections Training Academy (P-4) requesting the split sample. He then identified the September 29, 2003, letter from the attorney for the Department of Corrections (P-5) advising that the split sample had been destroyed. He reasserted that he wanted to have the split sample tested to show that he was free of drugs.

Section IV.B.6. of the Attorney General's Drug Testing Policy (P-6) provides that trainees shall have the option to provide the monitor with a second urine specimen at the same time the first specimen is collected. Subparagraph b. of this section provides:

> The law enforcement agency shall maintain possession of the second specimen for a period of 60 days or until the agency receives notification from the state toxicology laboratory that the first specimen tested negative for the presence of controlled substances.

While the foregoing provision initially appears to be somewhat confusing, a close reading supports the conclusion that the sixty-day time period is a maximum time period for retention of the second specimen, and this time period may be reduced if there is a negative test result.

Subparagraph 6.c.(2) states that the second specimen shall be released by the law enforcement agency when the agency is informed by the individual whose specimen tested positive that the individual wishes to have the specimen independently tested.

In the present matter, there is no question that the petitioner wished to have the second specimen or "split sample" independently tested. Unfortunately, petitioner's attorney initially requested the release of the split sample from the Police Training Commission on August 19, 2003 (P-3) rather than from the Department of Corrections Training Academy, the law enforcement agency that would be able to release the second specimen. It was not until petitioner's attorney's letter dated August 23, 2002 (P-4), that the Department of Corrections Training Academy was notified of this request. This request was in excess of the sixty-day period

specified for the retention of second specimens. By the letter of respondent's attorney dated September 29, 2003 (P-5), petitioner's attorney was advised that respondent no longer possessed petitioner's split sample.

Based on this factual scenario, the question arises whether the inability of the petitioner to obtain access to the second sample for testing should have any impact on the petitioner's dismissal from the Training Academy.

In Oslovich v. Essex County Police Training Academy, 93 N.J.A.R. 2d (PTC) 48, the Commission concluded that due to the serious consequences that emanate from a positive drug test, the drug screening procedures outlined in the Commission Rules must be followed without deviation. Id. at page 51. However, Oslovich involved a challenge to the handling of urine samples where the bottles were not inspected to insure no pre-void tampering, the vial for the sample in question had not been inspected by the monitor and by petitioner, and there was no laboratory chain of custody form prepared. In addition, the vial was transported in a rack rather than a plastic envelope sealed with evidence tape. In the final agency decision, the Commission concluded that the procedure used by respondent during the drug screening varied from the procedures mandated by the Commission rules and that the variation in procedures compromised the integrity of the result reported for petitioner. I **CONCLUDE** that the holding in Oslovich is inapplicable to the present matter since there has

been no showing of any deviations in the mandated procedures.

In a recent case, George v. City of Newark, 384 N.J. Super. 232 (App. Div. 2006), the City terminated the petitioner, a police sergeant, after he tested positive for marijuana. The petitioner obtained access to his split sample which was given to an independent lab and tested negative. However, the City failed to advise the independent lab of the proper testing threshold rendering the testing process flawed. The petitioner alleged that this deprived him of his due process opportunity to establish the falsity of the positive test. The Court held that without bad faith on the part of the City, the "failure to preserve potentially useful evidence does not constitute a denial of due process of law," and that it is only the suppression of exculpatory evidence that violates due process "irrespective of the good faith or bad faith of the prosecution." [Citations omitted.] Id at 243. In the absence of bad faith, relief should be granted only where there is a 'showing of manifest prejudice or harm' arising from the failure to preserve evidence. Ibid.

In the present matter, the second specimen cannot be considered exculpatory evidence since it was never tested and the State Laboratory's definitive test was positive for cocaine. At best, it was potentially exculpatory. Ibid. Thus, there can be no showing of prejudice to the petitioner resulting from the disposal of the second sample. Further, there is no evidence in the record which would support a finding of bad faith on the part of the respondent, Department of Corrections Training

Academy. Attorney for petitioner's correspondence requesting access to the second sample for testing did not reach respondent until more than 67 days had elapsed from the date of the collection of the sample. In addition, there is nothing in the record before me which would support a finding that the respondent acted to intentionally deprive petitioner of access to the second specimen. Therefore, I **CONCLUDE** that petitioner's inability to obtain access to his second specimen for testing cannot be considered a denial of due process under the foregoing circumstances.

DECISION AND ORDER

Based upon the **FINDINGS** and **CONCLUSIONS** set forth above, it is hereby **ORDERED** that the action of respondent Department of Corrections Training Academy dismissing petitioner from the Basic Corrections Officer Training Course is hereby **AFFIRMED** and petitioner's appeal to the Police Training Commission is hereby **DENIED** and **DISMISSED**.

I hereby **FILE** this Initial Decision with the **POLICE TRAINING COMMISSION.**

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION,** who/which by law is authorized to make a final decision in this matter. If the POLICE TRAINING Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 20, 2006
DATE

/s/
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/21/06
DATE

/s/
POLICE TRAINING COMMISSION

Mailed to Parties:

JUL 24 2006
DATE

/s/Director and Chief Administrative Law Judge
OFFICE OF ADMINISTRATIVE LAW
mph

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PTC 8746-02
AGENCY DKT. NO. CJ02-9492-HPT

CHRISTOPHER TUSKUSKY,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS TRAINING ACADEMY,

Respondent.

Jack Venturi, Esq., for petitioner

Betty N. Ng, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey)

Record Closed: August 8, 2003
Decided: September 22, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals his dismissal by the Department of Corrections Training Academy from a

basic course for correction officers because of a positive drug test for cocaine. Petitioner requested a hearing, and the matter was transmitted to the Office of Administrative Law (OAL) on December 30, 2002, for hearing as a contested case. This matter was assigned to me on January 15, 2003, and a telephone prehearing conference was scheduled for March 26, 2003. Following this, telephone conferences occurred on April 15, 2003, and May 28, 2003, relating to discovery issues. In particular, attorney for respondent was ordered to report the location of a missing urine specimen so that I could enter an order for its testing, and attorney for petitioner was to specify those items that were not provided in discovery.

By motion dated July 3, 2003, attorney for petitioner filed a dispositive motion seeking an order to dismiss the dismissal of petitioner from respondent training academy and for his reinstatement therein. Attorney for respondent responded to the motion on July 25, 2003, and the record was closed with respect to the motion on August 8, 2003.

FACTUAL DISCUSSION

For purposes of deciding the within motion, I considered the following to be undisputed facts herein.

Petitioner was dismissed from the Correctional Staff Training Academy on June 27, 2002, for an alleged positive urine sample in which he allegedly tested positive for cocaine (P-1, Exhibit

A). It is undisputed that attorney for petitioner sought to obtain discovery prior to the transmittal of this matter to the OAL in July and August 2002. Additional discovery requests were made in November 2002, and January 2003. On April 26, 2003, some initial discovery was provided, but the location of the urine sample was not disclosed to attorney for petitioner. In addition, petitioner requested a medical review officers' report that compares the test results with the medical questionnaire submitted with the specimen to determine whether any substance listed on the questionnaire would explain the test results.

An order was entered on May 5, 2003, requiring that respondent provide discovery of all discoverable material, including lab results, charts, photographs, drug testing records, and the names of all the individuals who monitored the testing that day. In response to this, the attorney for respondent indicated that an order was required to obtain petitioner's urine sample. An additional order was entered on May 21, 2003, confirming the contents of the order of May 5, 2003, and requiring that respondent confirm the location of the urine sample of petitioner.

In response to this, attorney for respondent indicated that all of the usual discoverable documents in removal cases for positive drug results had been provided, and that respondent does not possess additional chemist's notes, photographs or similar documents.

LEGAL DISCUSSION AND ANALYSIS

Of particular concern in this matter is the Continuity of Evidence Urine Specimen form (P-1, exhibit *J)* provided to attorney for petitioner in discovery, and the fact that no additional documents or responsive affidavits or certifications were submitted in this matter by respondent to raise a factual dispute concerning the lack of a chain of custody.

In order to assure that correction officers are fully trained and qualified for the carrying out of their duties and responsibilities, *N.J.S.A.* 52:17B-68.1a provides that no person shall be given a permanent appointment as a corrections officer unless such person has successfully completed a training course at an approved school. *N.J.S.A.* 52:17B-71(a), (c), and (e), vests in the Police Training Commission the power, responsibility and duty to prescribe standards for the approval of schools at which police training courses for corrections officers shall be conducted, to prescribe the curriculum, the minimum courses of study and standards of operation for such schools and to certify corrections officers who have satisfactorily completed training program.

N.J.S.A. 52:17B-1(h) further provides that the Police Training Commission is authorized to make such rules and regulations as may be reasonably necessary or appropriate to accomplish the purposes and objective of the Act. Pursuant to this authority, the Police Training Commission has adopted

N.J.A.C. 13:1-7.2 which specifies the responsibilities of the entity operating the training academy, and which states in relevant part:

> (a) The law enforcement agency, combination of law enforcement agencies, institution of higher learning, or recognized governmental entity certified to operate a school is vested with the power, responsibility and duty;
>
> 1. To comply with all Commission rules, standards and directives governing the operation of the school;
>
> * * *
>
> 19. To conduct drug screening of all trainees so as to provide for the safety and welfare of all trainees, instructors and other school personnel in accordance with the following procedures:
>
> i. All trainees will be requested to sign a notice and acknowledgment in a form prescribed by the Commission consenting to the screening of their urine during the course. This notice and acknowledgment will include notification that a positive confirmation of the presence of illegal drugs in the trainee's urine will result in dismissal from the school;

ii. The Commission shall designate the laboratory for both the initial screening and confirmation analysis of urine. All schools shall utilize drug screening equipment and supplies as required or approved by the designated laboratory;

iii. Prior to the submission of a urine sample, the trainee will complete a medical questionnaire in a form prescribed by the Commission which shall clearly describe all drugs, both prescription and non-prescription, ingested during the past 30 days;

iv. Trainees will be required to submit urine samples at any time during the course;

v. A staff member of the school will be responsible for ensuring that all required forms, such as waivers, laboratory forms and medical questionnaires, have been thoroughly and accurately completed by the trainee. Prior to the submission of the sample, both the staff member and the trainee will inspect the specimen bottle for indications of damage and/or tampering;

vi. Urine samples will be acquired and processed in accordance with accepted chain of evidence procedures. Throughout the urine acquisition

process, the identity of the trainee shall be preserved through use of the trainee's social security number. No forms forwarded to the laboratory will contain the trainee's name;

vii. The trainee will complete the information requested on the specimenbottle label and any related agency or laboratory forms;

viii. After the staff member has inspected the information for accuracy, the trainee will void into the specimen bottle. The trainee will void without direct supervision unless the staff member has reason to believe that the trainee will alter or substitute a specimen. Under those circumstances, direct supervision is permitted. The specimen will be handled and processed in accordance with procedures approved by the Commission;

ix. After ascertaining that all forms have been completed accurately, the staff member shall take possession of the sample and ensure that it is delivered to the designated laboratory. This delivery shall occur within one laboratory working day of acquisition;

x. The designated laboratory shall provide the school director with notification of any urinalysis resulting

in a positive test result. A sample shall be considered positive for the presence of drugs only when a confirmatory test procedure has been conducted. A written laboratory report shall be obtained for all positive samples. All trainees who are found positive for drugs and an appropriate official in the trainee's law enforcement agency will be orally notified by the school director of the positive confirmation result as soon after notification from the laboratory as possible. A copy of the laboratory report shall be provided by the school director to Commission staff and, if requested, the trainee;

xi. The school director shall dismiss any trainee who produces a positive test result for illegal drug use. Such dismissal shall constitute a dismissal for misconduct; and

xii. The Commission may, as circumstances warrant, notify the central registry maintained by the Division of State Police of a trainee's positive test result for illegal drug use.

Based upon the foregoing it is clearly required by *N.J.A.C.* 13:1-7.2(a)19, subparagraph v that a staff member of the school is responsible for ensuring that all required forms, such as waivers, laboratory forms and medical questionnaires have been thoroughly and accurately completed by the

trainee. Prior to the submission of the sample, both the staff member and the trainee are required to inspect the specimen bottle for indications of damage and/or tampering. Subparagraph vi requires that urine samples be acquired and processed in accordance with accepted chain of evidence procedures. Subparagraph viii requires that after the trainee voids in the specimen bottle, the specimen will be handled and processed in accordance with procedures approved by the Commission. Subparagraph ix provides that after ascertaining that all forms have been completed accurately, the staff member shall take possession of the sample and ensure that it is delivered to the designated laboratory. This delivery shall occur within one laboratory working day of acquisition.

Subparagraph x requires the designated laboratory to provide the school director with notification of any urinalysis resulting in a positive test result. It goes on to state that a sample shall be considered positive for the presence of drugs only when a confirmatory test procedure has been conducted. A written laboratory report is required to be obtained for all positive samples. A copy of the laboratory report is required to be provided by the school director to Commission staff and, if requested, to the trainee.

Oslovich v. Essex County Police Training Academy, 93 *N.J.A.R. 2d* (PTC) 48, involved a challenge to the handling of urine samples. It was argued that the bottles were not inspected to insure no pre-void tampering. In addition, it was found that the vial had not been inspected by the monitor and

by petitioner and there was no laboratory chain of custody form prepared. The vial was transported in a rack rather than a plastic envelope sealed with evidence tape. In the final agency decision in that matter, it was stated that the Commission decided to adopt the ALJ's conclusion that the procedure used by respondent during the drug screening varied from the procedures mandated by the Commission Rules. Thus, it was stated,

> ... [T]he Commission decided to adopt the ALJ's conclusion that the variation in procedures compromised the integrity of the result reported for petitioner. * * * Instead the Commission concluded that due to the serious consequences that emanate from a positive drug test, the drug screening procedures outlined in the Commission Rules must be followed without deviation.
>
> [*Id.* at page 51.]

In her response, attorney for respondent asserts that a sufficient chain of custody has been established to ensure that petitioner's sample is reasonably reliable. However, I see no affidavit or certification nor any document that has been provided in discovery sufficient to establish anything like a sufficient chain of custody in this matter. The Continuity of Evidence Urine Specimen form (P-1, exhibit J) provided by respondent to petitioner in discovery simply establishes that a urine specimen was obtained from petitioner and was placed in

evidence storage. There is nothing in this form or anywhere else in the record in this matter to establish that it was removed from evidence storage, that it was transported to the State Toxicology Laboratory or received by that Laboratory, or that it was the same specimen that was tested by the Laboratory.

It is clear that respondent herein failed to comply without deviation with the drug screening procedures outlined in the Commission Rules, and I so FIND. Therefore, I CONCLUDE that the variation in procedures compromised the integrity of the result reported for petitioner, and that petitioner's dismissal from respondent's basic Correction officer training course should be REVERSED and petitioner's name should not be reported to the Central Drug Registry. It should be noted that the Police Training Commission lacks jurisdiction, to reenroll petitioner in a basic course.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the actions of respondent Academy dismissing petitioner from the basic corrections officer training course is hereby REVERSED and petitioner's appeal to the Police Training Commission is hereby GRANTED. It is further ORDERED that petitioner's name shall not be reported to the Central Drug Registry.

I hereby **FILE** this Initial Decision with the **POLICE TRAINING COMMISSION**.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, who/which by law is authorized to make the final decision on all issues within the scope of its predominant interest If the **POLICE TRAINING COMMISSION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 22, 2003

/s/ Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

9-25-03
DATE

/s/
POLICE TRAINING COMMISSION

Mailed to Parties:

SEP 26 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/s/
OFFICE OF ADMINISTRATIVE LAW

mph

Certified by the
National Board
of Trial Advocacy

Jack Venturi
Attorney-At-Law

87 Bayard Street ♦ New Brunswick, NJ 08901
(732) 247-3340 ♦ Fax (732) 247-5046 ♦
jventuri@earthlink.net ♦ www.jackventuri.com

May 7, 2003

Michael Pushko
Deputy Attorney General
State of New Jersey, Dept. of Law & Public Safety
Division of Law, Richard J. Hughes Justice Complex
25 Market Street, PO Box 112
Trenton, NJ 08625-0112

Re: Christopher Tuskusky v. Dept. of Corrections
Training Academy
OAL Docket No.: PTC 08746-02S

Dear Mr. Pushko:

I am writing with regard to the above matter. As you know, I would like to privately test the split sample with regard to this case however, there seems to be some confusion as to where this split sample is located. My secretary Jackie, spoke with you on April 4, 2003 and you stated that the sample was located in Sea Girt. Jackie called Sea Girt to set up a date and time for our investigator to pick up the sample, however she was told that they did not have

this sample and that it was located in the State Lab in Newark.

My secretary called the Newark lab to set up a date and time when the sample could be picked up however, Dr. Jackson stated that she would have to speak with Dermont O'Grady to make arrangements. The Newark lab was not willing to give out anymore information.

On April 11, 2003 my secretary spoke with Dermont O'Grady who stated that he would be able to confirm which lab had this sample. He stated that he would contact our office on April 14, 2003 with the location of the sample however, we still have not received confirmation from him as to there the sample is.

I was also told that you would be able to confirm where this sample was located during our last telephone conference on April 15, 2003. You stated that you would call my office on April 16, 2003 to confirm where this sample was located however, it is now May 7, 2003 and our office has still not received confirmation as to where this sample is located.

I feel that my client and I have been more than patient with regard to this matter. I need to have this sample tested privately however, without confirmation of its location I cannot do so. I cannot send my investigator to a lab to pick up a sample if I am not positive that it will be there.

Thank you for your attention to this matter. Please contact my office with regard to this matter.

Very truly yours,

/s/
Jack Venturi, Esquire

JV/jk
Cc: Judge Martone
Dermont O'Grady
Christopher Tuskusky

Certified by the
National Board
of Trial Advocacy

Jack Venturi
Attorney-At-Law

87 Bayard Street ♦ New Brunswick, NJ 08901
(732) 247-3340 ♦ Fax (732) 247-5046 ♦
jventuri@earthlink.net ♦ www.jackventuri.com

January 22, 2003

NJ Department of Corrections Training Academy
PO Box 438
Sea Girt, NJ 08750-0438

Re: Christopher Tuskusky
Date of Occurrence: 6/27/02
Correctional Staff Training Academy

Dear Sir or Madam:

I am renewing my request for all relevant discovery with regard to the above matter. I previously requested all records pertaining to Mr. Tuskusky's drug test of June 17, 2002, including but not limited to lab results, charts, photographs, etc. I am now requesting the drug testing records, and the names of all the individuals who monitored the testing that day.

Additionally, I am requesting a split sample for testing by my own lab.

Thank you for your attention to this matter.

Very truly yours,

/s/
Jack Venturi, Esquire

JV/jk
cc: Christopher Tuskusky
Police Training Commission

Certified by the
National Board
of Trial Advocacy

Jack Venturi
Attorney-At-Law

87 Bayard Street ♦ New Brunswick, NJ 08901
(732) 247-3340 ♦ Fax (732) 247-5046 ♦
jventuri@earthlink.net ♦ www.jackventuri.com

November 18, 2002

Police Training Commission
Division of Criminal Justice
25 Market Street
PO Box 085
Trenton, NJ 08625

Re: Christopher Tuskusky
Date of Occurrence: 6/27/02
Correctional Staff Training Academy

Dear Madam or Sir:

This is a request for all discoverable materials that the Police Training Commission has concerning the alleged disqualification of Mr. Tuskusky.

Additionally, I am requesting a split sample for testing by my own lab. I have already specified in my letter dated August 19, 2002 that I would need a split sample.

Moreover, I am attaching a report dated July 15, 2002 by my client's physician indicating a negative urine analysis.

Lastly, we recognize that Mr. Tuskusky may not be enrolled in another Commission-approved school while he has an appeal of that dismissal pending without the Commission's permission. Therefore, we ask that the Commission take notice of 13:1-9.6(b), and invoke their powers to decide on a case-by-case basis whether to reinstate Mr. Tuskusky while his appeal is pending.

Thank you for your prompt response to this request.

Very Truly Yours,

/s/_____
JACK VENTURI

cc: Dermont O'Grady
Craig Conway
Christopher Tuskusky

Certified by the
National Board
of Trial Advocacy

Jack Venturi
Attorney-At-Law

87 Bayard Street ♦ New Brunswick, NJ 08901
(732) 247-3340 ♦ Fax (732) 247-5046 ♦
jventuri@earthlink.net ♦ www.jackventuri.com

September 25, 2002

Mr. Dermot P. O'Grady
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
Police Training Commission
P.O. Box 085
Trenton, NJ 08625-0085

Re: Appeal of Christopher Tuskusky' dismissal from the Correctional Staff Training Academy

Dear Mr. O'Grady;

Thank you for speaking with my law clerk on Wednesday regarding the requisite form and content of notices of appeal as they pertain to the above-captioned matter. As you know from our previous correspondence, our client, Chris Tuskusky, was dismissed from the NJ Department of Corrections Training Academy ("Academy") on June 27, 2002. The Academy has stated that Mr. Tuskusky's dismissal from the Correctional Staff Training

Program was based on a positive drug test result supposedly drawn from Mr. Tuskusky's urine.

Mr. Tuskusy denies any association with illegal drugs that would have constituted sufficient grounds for his dismissal from the Academy's Corrections Staff Training Program. Further, Mr. Tuskusky is contesting both the drug test results offered by the Academy in his case, and the drug testing procedures employed in same. Accordingly, Mr. Tuskusky is appealing his dismissal from the Academy and wished to be reinstated without delay. We submit this letter as Mr. Tuskusky's notice of appeal setting forth the subject matter of the appeal, the relief sought and the grounds therefore.

Very truly yours,

Jack Venturi

JV/dad
cc: Christopher Tuskusky
DICTATED BUT NOT READ

Certified by the
National Board
of Trial Advocacy

Jack Venturi
Attorney-At-Law

87 Bayard Street ♦ New Brunswick, NJ 08901
(732) 247-3340 ♦ Fax (732) 247-5046 ♦
jventuri@earthlink.net ♦ www.jackventuri.com

August 23, 2002

NJ Department of Corrections Training Academy
P.O. Box 438
Sea Girt, NJ 08750-0438

Re: Christopher Tuskusky
Date of Occurrence: 6/27/02
Correctional Staff Training Academy

Dear Sir or Madam:

Please be advised that I have retained to represent Christopher Tuskusky with regard to the above matter. Please be further advised that Mr. Tuskusky is appealing the dismissal. Forward all forms to be completed regarding same.

Further, I am requesting that you forward me any and all records pertaining to his drug test of June 17, 2002, including but not limited to lab results, charts, photographs, etc.

Also I am requesting the split sample for testing by my own lab.

Thank you for your prompt response to this request.

Very truly yours,

/s/_____
Jack Venturi

JV/jnm
DICTATED BUT NOT READ

Cc: Christopher Tuskusky

Certified by the
National Board
of Trial Advocacy

Jack Venturi
Attorney-At-Law

87 Bayard Street • New Brunswick, NJ 08901
(732) 247-3340 • Fax (732) 247-5046 •
jventuri@earthlink.net • www.jackventuri.com

August 19, 2002

Via Facsimile and Regular Mail
Police Training Commission
Division of Criminal Justice
25 Market Street
P.O. Box 085
Trenton, New Jersey 08625
Attention: Margaret Hall

Re: Christopher Tuskusky
Date of Occurrence: 6/27/02
Correctional Staff Training Academy

Dear Ms. Hall:

As you are aware, I have been retained to represent Christopher Tuskusky with regard to the above matter. As you are also aware, Mr. Tuskusky appealed the dismissal. When my office last spoke to you, you advised that nothing further had to be done by this office, but that we should await a response from your attorney, which should be within one

week. As of this date, almost one month later, I have yet to hear from your attorney.

I am requesting that you forward me any and all records pertaining to his drug test of June 17, 2002, including but not limited to lab results, charts, photographs, etc. .

Also I am requesting the split sample for testing by my own lab.

Thank you for your prompt response to this request.

Very truly yours,

Jack Venturi

JV/jnm
DICTATED BUT NOT READ

Certified by the
National Board
of Trial Advocacy

Jack Venturi
Attorney-At-Law

87 Bayard Street ♦ New Brunswick, NJ 08901
(732) 247-3340 ♦ Fax (732) 247-5046 ♦
jventuri@earthlink.net ♦ www.jackventuri.com

July 23, 2002

Via Facsimile and Regular Mail
Police Training Commission
Division of Criminal Justice
25 Market Street
P.O. Box 085
Trenton, New Jersey 08625

Re: Christopher Tuskusky
Date of Occurrence: 6/27/02
Correctional Staff Training Academy

Dear Sir or Madam:

Please be advised that I have been retained to represent Christopher Tuskusky with regard to the above matter. Please be further advised that Mr. Tuskusky is appealing the dismissal. Forward all forms to be completed regarding same.

Further, I am requesting that you forward me any and all records pertaining to his drug test of

June 17, 2002, including but not limited to lab results, charts, photographs, ets.

Thank you for your prompt response to this request.

Very truly yours,

/s/_____
Jack Venturi

JV/lg
DICTATED BUT NOT READ

NEW JERSEY DEPARTMENT OF CORRECTIONS TRAINING ACADEMY

CONTINUITY OF EVIDENCE
URINE SPECIMEN

FACILITY: _____ CYCLE# 171 DATE: 6-17-02

EMPLOYEE IDENTIFICATION NUMBER (SOC.SEC.):_____

DATE VOIDED: 6-17-02 TIME 9:31 AM

OFFICIAL MONITOR: SGT. NAPPA
TITLE: _____

EMPLOYEE'S WITNESS (IF ANY):_____

MONITOR'S WITNESS (IF ANY): _____

THE CLOSED, SEALED AND LABELED SPECIMEN OF THE EMPLOYEE OR APPLICANT WAS RECEIVED BY: _____
Signature and Title of Monitor

Specimen placed in Evidence Storage, Time: 10:35AM

DATE: 17 Jun 02 BY: _____
Signature

Specimen removed from Evidence Storage, Time:__
_____AM/PM
Signature

Specimen transported from: _____ to State Toxicology Laboratory Place of Storage

TIME:_____AM/PM DATE:____BY:_____AM/PM
Signature

Specimen Received at State Toxicology Laboratory at: _____AM/PM

DATE:_____BY:_____
Signature and Title

The original of this form shall remain with the specimen until the testing process is completed. The original of this form must be returned to the Trainee's folder upon completion of testing. If the result of the test proves positive, the original of this form shall be forwarded to the Police Training Commission. Failure to properly complete and date all sections of this form may result in the dismissal of any administrative/disciplinary action taken as result of the submission of this urine specimen.

DRUG TESTING

Attorney General's Law Enforcement Drug Testing Policy

Issued October 1986
Revised August 1990
Revised September 1998
Revised June 2001

I. Applicability

A. This policy applies to:

1. Applicants for a position as a law enforcement officer who, if appointed, will be responsible for the enforcement of the criminal laws of this State and will be authorized to carry a firearm under *N.J.S.A*, 2C:39-6;

2. Law enforcement officer trainees subject to the Police Training Act while they attend a mandatory basic training course; and

3. Sworn law enforcement officers who are responsible for the enforcement of the criminal laws of this State, come under the jurisdiction of the Police Training Act and are authorized to cany a firearm under *N.J.SA.* 2C:39-6.

B. This policy does not require law enforcement agencies to drug test applicants, nor does it require law enforcement agencies to implement a random drug testing program for sworn officers. However, law enforcement agencies have an independent obligation to undertake the drug testing of individual officers when there is reasonable suspicion to believe that the officer is illegally using drugs.

II. Types of drug testing

A. Applicants for a position as a law enforcement officer

1. Applicants may be required to submit a urine specimen at any time prior to appointment.

B. Law enforcement trainees

1. Trainees will be required to submit one or more urine specimens for testing while they attend a mandatory basic training course. All drug testing conducted during mandatory basic training will comply with rules and regulations established by the Police Training Commission.

2. Individual trainees may also be required to submit a urine specimen for testing when there exists reasonable suspicion to believe that the trainee

* * *

h. The agency's rules and regulations or appropriate standard operating procedures shall further provide that officers who refuse to submit to a drug test when randomly selected are subject to the same penalties as those officers who test positive for the illegal use of drugs. A sworn law enforcement officer who resigns or retires after receiving a lawful order to submit a urine specimen for drug testing and who does not provide the specimen shall be deemed to have refused to submit to the drug test.

IV. Specimen acquisition procedures

A. Preliminary acquisition procedures

1. The law enforcement agency shall designate a member of its staff to serve as monitor of the specimen acquisition process. The monitor shall always be of the same sex as the individual being tested. In the event there is no member of the same sex available from the agency collecting the specimens, the agency may request that a member of the same sex from another law enforcement agency serve as monitor of the process.

2. The monitor of the specimen acquisition process shall be responsible for:

    a. Ensuring that all documentation is fully and accurately completed by the individual submitting the specimen.

    b. Collecting specimens in a manner that provides for individual privacy while ensuring the integrity of the specimen.

c. Complying with chain of custody procedures established for the collection of urine specimens and their subsequent submission to the New Jersey State Toxicology Laboratory within the Division of Criminal Justice for analysis.

3. Prior to the submission of a specimen, an applicant for a law enforcement position shall execute a form consenting to the collection and analysis of their urine for illegal drugs. (Attachment A) The form shall also advise the applicant that a negative result is a condition of employment and that a positive result will: a) result in the applicant being dropped from consideration for employment; b) cause the applicant's name to be reported to the central drug registry maintained by the Division of State Police; and c) preclude the applicant from being considered for future law enforcement employment for a period of two years. Applicants shall not complete a medical questionnaire (Attachment B)

prior to the submission of a specimen unless they have already received a conditional offer of employment. However, applicants who have not received a conditional offer of employment can be required to complete a medical questionnaire if, following the submission of their specimen to the State Toxicology Laboratory for analysis, the law enforcement agency receives a report indicating that the specimen tested positive for a controlled substance.

4. Prior to the submission of a urine specimen, a trainee enrolled in a basic training course shall execute a form (Attachment C) advising the trainee that a negative result is a condition of employment and that a positive result will: a) result in the trainee being dismissed from basic training; b) cause the trainee to be dismissed from employment as a law enforcement officer by his or her appointing authority; c) cause the trainee's name to be reported to the central drug registry maintained by the Division of State Police; and d) cause the

trainee to be permanently barred from future law enforcement employment in New Jersey. The form shall also advise trainees that the refusal to participate in the test process carries the same penalties as testing positive. Trainees shall also complete a medical questionnaire (Attachment B) which clearly describes all medications, both prescription and over-the-counter (non-prescription), that were ingested in the past 14 days.

5. Prior to the submission of a urine specimen, sworn law enforcement officers shall complete a medical questionnaire (Attachment B) which clearly describes all medications, both prescription and over-the-counter (non-prescription), that were ingested in the past 14 days.

B. Specimen collection

1. Throughout the test process, the identity of individual applicants, trainees and sworn law enforcement officers shall remain confidential. Individual specimens shall be identified throughout the process by the

use of social security numbers. At no time shall an individual's name appear on any form or specimen container sent to the State Toxicology Laboratory.

2. Specimens will be collected utilizing equipment and supplies approved by the State Toxicology Laboratory. Under no circumstances may a specimen be collected and submitted for analysis in a specimen container that has not been approved by the State Toxicology Laboratory.

3. Urine specimens will be acquired and processed in accordance with procedures established by the State Toxicology Laboratory.

   a. After the monitor has inspected the appropriate forms for accuracy, the applicant, trainee or sworn officer shall void into the specimen collection container.

   b. After a specimen has been produced, the individual shall seal the specimen container and deliver it to the monitor.

   c. Once the monitor is

satisfied that the required documentation is accurate and he or she has inspected the specimen container to determine that a specimen has been produced, the monitor shall take possession of the specimen and ensure that it is delivered to the State Toxicology Laboratory for analysis.

4. Individuals will void without the direct observation of the monitor unless there is reason to believe that the individual will adulterate the specimen or otherwise compromise the integrity of the test process. Under these circumstances, the production of a specimen may be directly observed by the monitor. Law enforcement agencies must document the facts underlying their belief that an individual may adulterate a specimen or compromise the integrity of the test process.

5. Individuals that initially are unable to produce a urine specimen may remain under the supervision of the test monitor until the monitor is satisfied

that the individual cannot produce a specimen. While, the individual is under supervision, the monitor may allow the individual to drink fluids in an attempt to induce the production of a specimen, if the individual remains unable to provide a specimen after a reasonable period of time, the monitor may have the individual examined by a doctor to determine whether the inability to produce a specimen was the result of a medical or physical infirmity or constituted a refusal to cooperate with the drug testing process.

6. Trainees and sworn law enforcement officers shall have the option to provide the monitor with a second urine specimen at the same time the first specimen is collected.

   a. The second specimen shall be collected in the same fashion as the first specimen. The monitor shall take possession of the second specimen and place it in a secured refrigerated storage area.

   b. The law enforcement

agency shall maintain possession of the second specimen for a period of 60 days or until the agency receives notification from the State Toxicology Laboratory that the first specimen tested negative for the presence of controlled substances.

c. The second specimen shall be released by the law enforcement agency under the following circumstances:

* * *

5. The analysis of each specimen shall be done in accordance procedures adopted by the State Toxicology Laboratory. These procedures shall include but not be limited to security of the test specimens, chain of custody, metabolite cut-off levels and the issuance of test reports.

VII. Drug test results

A. The State Toxicology Laboratory shall notify the submitting law enforcement agency of test results from the specimens submitted for analysis. All

reports shall be in writing and sent to the agency within 15 working days of the submission.

B. The State Toxicology Laboratory shall not report a specimen as having tested positive for a controlled substance until the specimen has undergone a confirmatory test and the medical review officer has reviewed the results of that test with the medical questionnaire pertinent to that specimen.

C. The submitting agency shall notify the applicant, trainee or sworn officer of the results of a positive test result as soon as practical after receipt of the report from the State Toxicology Laboratory. Upon request, the individual may receive a copy of the laboratory report.

D. Under no circumstances may an agency or an individual resubmit a specimen for testing or ask that a particular specimen within the possession of the State Toxicology Laboratory be retested.

VIII. Consequences of a positive test result

A. When an applicant tests positive for illegal drug use:

1. The applicant shall be

immediately removed from consideration for employment by the agency;

2. The applicant shall be reported to the Central Drug Registry maintained by the Division of State Police by the law enforcement agency to which the individual applied; and

3. The applicant shall be precluded from consideration for future law enforcement employment by any law enforcement agency in New Jersey for a period of two years.

4. Where the applicant is currently employed by another agency as a sworn law enforcement officer, the officer's current employer shall be notified of the positive test result. Under these circumstances, the officer's current employer is required to dismiss the officer from employment and also report his or her name to the Central Drug Registry maintained by the

overall chain of custody question. So, although years have passed, nothing new, at least from myy office, has been learned. So, we're still at the same stage, Your Honor.

THE COURT: All right. Thank you. Ms. Ng.

MS. NG: Good morning, Your Honor. First, actually, I'd like to address this burden of proof. I actually would like to submit that the burden of proof should be on the petitioner who is only a trainee for the training academy and is not even a recruit yet for the Department of Corrections. As only a trainee, the burden of proof should be on the petitioner. However, nevertheless, to go forward with this hearing, we -- all trainees are subject to mandatory drug testing, and as a condition of employment by the Department of Corrections, a negative result must be obtained from the drug testing. Any positive test result will be -- will lead to automatic termination from the Department of Corrections Training Academy and therefore, the Department of Corrections.

Here, Mr. Tuskusky was tested, submitted his urine sample on June 17, 2002. We do have witnesses here who will testify to how the testing was done, who was monitoring, who submitted the specimen to storage and how it was transported to the state toxicology

* * *

the sanction for a positive screening?

A According to the Police Training Commission, a positive screening is immediate removal from the academy.

MS. NG: Okay. All right. No further questions.

THE COURT: Cross examine.

MR. HENNINGER: Thank you. Your Honor.

CROSS EXAMINATION BY MR. HENNINGER:

Q Sergeant Nappa, were you the official monitor of this urine sample given by Mr. Tuskusky to the best of your knowledge?

A No, I'm not the official monitor. The official monitor is the person that is witnessing the actual urine being voided.

Q Can I have you look at R-4, please?

A Yes.

Q Up at the top, there's a section saying "official monitor." Do you know who's name appears there?

A That's Sergeant Nappa slash Dan Braun, that's a "D- Braun."

Q Oh, okay.

A That's his signature, and under title, it says "SCO."

Q Okay. So, there's two official monitors then?

A Yes.

Q Okay. So, you would be considered one of them?

A Not really. The reason that they put my name down there is I'm the one that did all the paperwork. I'm the one that advised them of the policy and procedures, and I'm the class supervisor who gave the order to void. The instructor that signed next to it is the official monitor that is there when a urine is voided.

Q Okay. So, did you fill out this paperwork at all?

A No, the trainee actually fills this paperwork out.

Q Okay. And who -- with R-4, does the trainee hold on to it, does the trainee give it to somebody?

A No. The trainee holds on to that paperwork along with the medical paperwork until he voids his urine. Then, this is given to the instructor, in this case, which was Instructor Britt. The official monitor, R. Braun, would sign this in the bathroom, make sure it was filled out with the social security number and everything by the trainee. Then, on the bottom, you can see it says "The closed, sealed and labeled specimen of the employee or applicant was received by."

Then, he would take this, along with his medical documentation and the -urine out into the open classroom where Instructor Britt received that and put it into the numbered boxes that we have.

Q Okay. So, are you familiar then -- even though you're not the official monitor, are you familiar with the drug testing policies, including procedures for what the official monitor should be doing?

A Yes.

Q Okay. If I can show you what I will have marked as-- I believe I'm up to P-6. I will be giving you my copy. I have a copy for the Court. For the record, this is Attorney General's Law Enforcement Drug Testing Policy, revised June 2001.

(P-6 was marked for Identification.)

BY MR. HENNINGER:

Q If I can have you turn to page five. And if you can look under Roman number four, section uppercase A, number two,' if you can read that, please, out loud from two -- going through 2A to the end of 2C?

A Sure. "The monitor of the specimen acquisition process shall be responsible for"--

THE COURT: I'm sorry. Let me interrupt.

What — where is —

MR. HENNINGER: Page five, Your Honor.

THE WITNESS: Page five, Your Honor.

THE COURT: Okay.

BY MR. HENNINGER:

Q Page five of -- there's Roman numerals. I'm under Roman numeral four, section A, section two.

MS. NG: Your Honor, I'm going to object to the reading out loud of what the policy -- what it is. It speaks for itself-

THE COURT: If it's -- it's not in evidence yet. Do you have any objection to it being marked in evidence?

MS. NG: Not particularly, no, but I'm just objecting to having the witness read out loud the policy.

THE COURT: But the point is it's not inappropriate to have it read unless it's in evidence. Then, it's a waste of time. So, if — there's no objection. Do you have any objection to it being marked in evidence?

MS. NG: No.

THE COURT; Okay. You want to move it in evidence?

MR. HENNINGER: Yes, Your Honor.Nappa – Cross

THE COURT: Okay. P-6 in evidence.

(P-6 was received in Evidence)

BY MR. HENNINGER:

Q Sergeant Nappa, you got a chance to read that to yourself?

A Yes. Yes.

Q Okay. So --

THE COURT: And it's Roman numeral four, A, two?

MR. HENNINGER: Yeah.

THE COURT: Okay.

MR. HENNINGER: And sections A through C.

THE COURT: Okay.

BY MR. HENNINGER:

Q Essentially, to summarize, does that section indicate that the official monitor of the urine specimen is to comply with, appropriate chain of custody procedures?

A Yes.

Q Okay. If I can then have you turn your attention back to R-4 and look at that continuity of evidence document. Based on your opinion as you previously just testified that you're familiar with the policies, in your opinion, for whatever it is worth, does it appear that in this case, the chain of evidence procedures, as mandated by those policies were followed?

A Not with respect to transportation of taking them out of the freezer and transporting. No, it wasn't followed.

Q Okay. And then, again, I believe this has been marked into evidence, but if you could just -- there's a paragraph on the bottom. If you could please read that to. yourself if you haven't already.

A Yes.

MR. HENNINGER: Your Honor, with — I'll skip that.

BY MR. HENNINGER:

Q Does that paragraph essentially reiterate the policies we just talked about in that it says that everything has to be completed in order to insure proper chain of custody?

A Yes.

MR. HEMKINGER: Okay. That's all I have. Your Honor.

REDIRECT EXAMINATION BY MS. NG:

Q Just for the record,' Sergeant, do you know where is Mr.-- Officer Britt?

A Yes, Officer Britt is here.

Q Oh, I'm sorry. Braun. I see the B.

A Officer Braun. Yes, Officer Braun has since left our department, and he has transferred over

to the Division of Parole, I believe, in Special Investigations Division.

MS. NG: And Your Honor, actually, I'd like to stipulate that I found out that Mr. Braun is on military leave, okay, which is why he's not here to testify. I did ask for him.

THE COURT: On military leave.

MS. NG: Yes. I did ask for his attendance, but he's on military leave.

THE COURT: Okay.

BY MS. NG:

Q Do you know where is Patricia Watson?

A Patricia Watson has since retired.

Q Okay, and do you know if they were all – they were trained to do the monitoring, receiving the specimens and transportation?

A Yes. Instructor Watson was trained in how to do this. She failed to do the proper paperwork, and she was disciplined for that.

MS. NG: Thank you. No further questions.

MR. HENNINGER: One question, Your Honor.

THE COURT: Yes.

RECROSS EXAMINATION BY MR. HENNINGER:

Q You just said Patricia Watson was disciplined. Was that with respect to this case or another case or just on the record?

A Actually, with respect to this whole class for the paperwork that was done. She failed to do the paperwork as instructed, and she received a discipline through the Department of Corrections for that

MR. HENNINGER: That's all I have. Thank you.

THE COURT: Anything else of the witness?

MS. NG: No, Your Honor.

THE COURT; All right. Thank you. You can step down. Actually, can ve take a couple minute recess?

MS. NG; Oh, sure, no problem.

MR. HENNINGER: Yes.

THE COURT: All right. We'll go off the record, briefly. Judge Martone in room six, if I can go off the record for a recess, please. Thank you.

(BRIEF RECESS)

THE COURT: All right. We're now back on the record. Sir, if you can raise your right hand.

V A N C E B R I T T, RESPONDENT'S WITNESS, SWORN

THE COURT: You may be seated. May I have your full name, please?

* * *

A That's probably true, yes.

Q And from these documents, they don't tell you who handled this in the various Ways, again, this was from received on the 18th. This other test was done on the 25th, correct? The GC/MS?

A 24th.

Q The 24th?

A Yes.

Q What document are you referring to for that?

A Document --

Q I'm looking at 023, otherwise known as DOC019, I have a date of 6/25.

A I'm looking at document 023. It doesn't have an R number. I think it's part of --

Q R-14?

A I think so, yes.

Q Okay. All right. So, there's two dates in there. There's ACQ on June 24 and then Kwat (phonetic) [sic] June 25th, last update June 25th. So, is it your testimony that this was on the 24th not the 25th?

A The 25th was the day it was-- the data was acquired, in other words, the day the testing was -- was assigned to the instrument. The report was done the following day, probably overnight.

Q Okay. So, again, with respect to these documents, they don't tell you every step of the process, otherwise known as chain of custody commonly, where these-- where the sample was, when it was accessed and who accessed it?

A Again, referring to the documents, I can tell who did the testing.

Q Other than who did the testing.

A And that individual would have come in contact with the specimen in order to do the testing.

Q That's correct. Other than that, it doesn't tell you -- it doesn't allow you to -- if we were to get a timeline, break out exactly when and where, account for every second and every moment, is that correct?

A That's correct.

Q Okay. Does the lab have such a chain of custody type of document?

A Not at this time. We do now.

Q You do now. When did that start?

A About two years ago when we had CAP certification.

Q Okay. What certification?

A CAP, College of American Pathology.

Q Is that a new certification program or how long has that been in existence?

A That's been in existence quite awhile. I think